

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

IN RE: PAYMENT CARD  
INTERCHANGE FEE and  
MERCHANT DISCOUNT ANTITRUST  
LITIGATION,

05 MDL 1720 (JG)

United States Courthouse  
Brooklyn, New York

December 18, 2006  
9:30 o'clock a.m.

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE JAMES ORENSTEIN  
UNITED STATES DISTRICT MAGISTRATE-JUDGE

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THE CLERK: Civil cause for status conference MDL 05-720, in Re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation.

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THE COURT: Good morning, all. As usual we will skip appearances on the record, but please identify yourselves when you begin speaking for the convenience of the court reporter.

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I received your status report. It's very helpful. Let's start marshaling through it. There was an issue about some deposition transcript in the Walmart litigation.

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Has this been resolved?

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MS. ROTTENBERG: We were raised the question of any deposition transcripts that were missing in earlier production. We worked in the process of finishing all of the transcripts that were produced and we produced any that we have.

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THE COURT: Sounds like you are on track for that.

MR. WILDFANG: We have gotten through two or three and are hoping to get through whatever remains that are missing.

THE COURT: Looks like there is nothing that I have to take up about the coding of documents.

Now, we have issue about the document production protocol between the defendants and the individual

1 plaintiffs.

2           Regarding Metadata. Mr. Blechman, you are speaking  
3 for the individual defendants?

4           MR. BLECHMAN: Yes, your Honor.

5           THE COURT: Do you agree under current Rule 34, the  
6 current version of it, what is at issue is covered?

7           MR. BLECHMAN: As amended what is at issue would be  
8 covered going forward.

9           THE COURT: I guess, that's why I asked the  
10 question. Then it comes down to if it's covered, then it's  
11 really whether the production that you don't want to provide,  
12 providing it is just and practicable. I am not sure that I  
13 understand the nature of your objection. It's not just or not  
14 practical or both?

15           MR. BLECHMAN: Both and intrusive and seeking  
16 information that was not requested by the defendants in their  
17 written discovery. I can elaborate.

18           THE COURT: Walk me through each. One, is it not  
19 just and practicable and go on, its a Rule 26 application  
20 beyond that.

21           MR. BLECHMAN: If I might?

22           THE COURT: Go ahead.

23           MR. BLECHMAN: The first I think is just to make sure  
24 we're talking about the same thing. The issue here, however,  
25 is that Metadata is a term new on the legal lexicon and talks

1 about what information, how electronic documents are tracked,  
2 names, dates, file types, applications, restrictions and  
3 alike.

4 The scope of the issue is framed to some extent by  
5 what has been discussed between the class and the defendants  
6 thus far in terms of their stipulation.

7 On page 2, Section 1C the stipulation that is sought  
8 of focusing this issue --

9 THE COURT: Give me a moment to find it.

10 MR. BLECHMAN: Yes, your Honor.

11 THE COURT: Go ahead.

12 MR. BLECHMAN: That provides the stipulation does not  
13 apply to documents that have been collected and processed or  
14 produced up to the effective date of the stipulation, which  
15 the defendants and the class simply selected November 22nd.  
16 We haven't agreed to that.

17 The point is, what we're talking about what we  
18 produced going forward, what we collect and haven't processed  
19 going forward, we don't think that information should be  
20 produced:

21 First, because it was not requested in the  
22 defendants' written discovery to us.

23 That discovery was served back in May or June. We  
24 objected. We said that -- we objected to producing  
25 information that sort for us to provide information that was

1 not required by the rules.

2 THE COURT: I get the argument about it wasn't  
3 requested or we raised an objection earlier to doing this.  
4 What I want to know, to the extent the rule has changed and  
5 the applicability turns on whether it's just or practicable,  
6 why is it neither of those two things?

7 MR. BLECHMAN: It's not relevant. In the words of  
8 Wyatt and Williams cases, that we cited in the papers, the  
9 district court said that Metadata is of little evidentiary  
10 value and a waste of resources.

11 The information that they are talking about here is  
12 information that is not -- doesn't have relevance in  
13 determining the file application nor file name and things of  
14 that sort.

15 THE COURT: Foregive me for interrupting. I think  
16 we're passing each other. To the extent you are arguing  
17 relevance, it seems to me what you are really arguing about is  
18 whether you are entitled to a protective order from the  
19 application of Rule 34 as it has been amended.

20 An earlier point in the discussion, unless you are  
21 willing to stipulate to it, is that we're under the current  
22 regime.

23 MR. BLECHMAN: Let me try to be specific. We don't  
24 think it's just or practicable for the following reasons:

25 First, we have started a search protocol in this case

1 in looking for and processing and producing information going  
2 back six months ago. What the defendants are asking us to do  
3 now, going forward with additional people, who they are asking  
4 us to search for, and we're talking about whether we'll do  
5 that or not, what they are asking us to do is to change the  
6 protocol we're using for selecting documents and processing  
7 them internally.

8 We're a depository that is setup in Tallahassee,  
9 Florida, that we have down to a science, how this information,  
10 once collected gets processed all the way to the end process  
11 where it's put on a disk and provided to the defendants in  
12 electronic format, which is searchable, such as the author,  
13 the recipient, the date, information which I can understand  
14 that they might need or want to have.

15 We're giving that information to them. What they're  
16 asking us to do is change that process which involves a lot of  
17 people, Judge. It's sort of akin to trying to move an  
18 aircraft carrier. It's not something that happens easily for  
19 us in having to institute a whole new number of protocols that  
20 we're not using.

21 THE COURT: Part of the problem you've been sending  
22 the aircraft carrier in the wrong direction.

23 MR. BLECHMAN: We don't think so.

24 THE COURT: To the extent there is a burden issue  
25 associated with changing it, I want to make sure that I



1 understand it. A lot of the burden-- seems to me -- at least  
2 from what I have seen in the status report-- arises from  
3 taking data in its native format and then changing it into  
4 something else and then OCRing it and providing it in that  
5 format. At least some of those steps, I take it, would be  
6 gone if you did as the defendants want?

7 MR. BLECHMAN: I'm not sure about that, your Honor.  
8 What is more the defendants raised this issue with us at a  
9 meeting in New York on December 4th. After that meeting, and  
10 I was there and I heard what they were saying, I went back and  
11 I asked some people to find out from our clients how easy or  
12 difficult it is to try to retrieve the information. The  
13 reports that I received back to date are-- not all of these  
14 clients have Metadata-- for more of the point, one report that  
15 I received, and I was told it could take several months to  
16 give the defendants what they are asking for.

17 That is the report that I have at this point.

18 THE COURT: You're going to walk me through in some  
19 more specific detail. I don't understand. Maybe I  
20 misperceive it. I don't understand it to be separate Metadata  
21 and give that separately in as much as you have a document in  
22 an electronic format that includes Metadata, provide it along  
23 with the document.

24 MR. BLECHMAN: As I understand the process -- I don't  
25 hold myself out --

1 THE COURT: Forget the process for a moment. I'm  
2 trying to understand the request that is in dispute here.

3 MR. BLECHMAN: The request in dispute, as we  
4 understand it, the defendants want us presumably to go forward  
5 to make a copy -- essentially -- I think what is largely at  
6 issue are e-mails. In conversation with defense counsel I  
7 think they acknowledged what we're talking about. What they  
8 want is, as I understand, for our clients' to go and to  
9 literally copy the entire contents, the entire contents of  
10 their e-mail files along with, to the extent that they have  
11 them and can find them, going to places where they maybe  
12 archived, raises a whole other slew of issues and trying to  
13 restore those and copy those as well.

14 From that point, the next step as I understand it  
15 would be the information is then provided to, I suppose to us,  
16 the lawyers, and then we'd have to cull through it to find  
17 what information is discoverable and what is not.

18 Realizing the path that this takes us. I know the  
19 Court remembers well the multiple status conferences that were  
20 had here where plaintiffs' counsel were discussing with the  
21 defendants' counsel the issue of search terms. That wasn't a  
22 process that happened overnight.

23 For us to then have to go -- where this is heading I  
24 believe-- they are then going to say, we want you to use  
25 search terms to search this enormous universe of materials,

1 most of which we believe is probably not relevant to this  
2 case. That's the reason this becomes such a big problem for  
3 us, your Honor.

4 THE COURT: I guess, there is something that I am  
5 missing. That may be a step down the road and we can talk  
6 about that.

7 In terms of what the defendants want you to do now,  
8 in terms of what it is you produced differs from which you  
9 want to produce, I'm still not seeing where you are not saving  
10 a step or two in producing the native format, rather than  
11 turning it into a different format.

12 MR. BLECHMAN: The reason for that, through  
13 interviewing the clients and finding out who are the people  
14 that we think have the documents or where are they located  
15 reasonably, we then take a hands on approach. We go in and can  
16 search for information at the clients or the clients who know  
17 their documents, they can do searches as to instructions that  
18 we provided to them.

19 Using protocols well recognized in the law, briefing  
20 a client as to what a defendant has requested in discovery,  
21 and having them execute on that sort of protocol and the  
22 information then comes to us, and for us this has been a  
23 process that has proven efficient and workable and produces  
24 information in a format that the defendants can use.

25 This is not the first time that we've done this, your

1 Honor.

2 THE COURT: I think I get what you are saying. To me,  
3 one thing that is not clear, and maybe it's just me. This  
4 sounds like argument that you might make if the case started  
5 today and we can clearly understand the new Rule 34 regime.

6 This strikes me purely as argument that you would  
7 make for a protective under Rule 26. I'm happy to consider it  
8 in that light.

9 What I don't get yet is why it's unjust or  
10 impracticable to apply the Rule 34 standard because that is  
11 what the Supreme Court requires.

12 MR. BLECHMAN: Doing so expands the scope of what the  
13 defendants have asked for. Doing so is going to multiply the  
14 amount of time it's going to take us to complete the discovery  
15 process, because doing so is requiring us to use a certain  
16 protocol that we've not used before and which we're less  
17 familiar with and --

18 THE COURT: You are reading my face, I think. I  
19 didn't mean to interrupt. Since I have in affect, where I  
20 think we keep missing each other, I don't understand if there  
21 is daylight between the standard for relief under Rule 26, if  
22 the case were starting today, and the standard for saying Rule  
23 34 doesn't apply because it's unjust and impracticable. Is  
24 there a difference or just the same inquiry?

25 MR. BLECHMAN: It's different because what I

1 understand the rule, the just and practicable standard is  
2 talking about is a retroactive application of the rule. What  
3 this Court is not faced with -- and I think this goes to the  
4 question that your Honor is asking me -- suppose for the sake  
5 of discussion this case began today, and you had these  
6 requests and these issues, what would you do?

7 But, your Honor, those are not these facts --

8 THE COURT: It's not that far removed. We knew what  
9 was coming as of December 1st for quite sometime?

10 MR. BLECHMAN: But the -- what defines our world--  
11 maybe I'm missing the Court. What defines our world, not what  
12 might be coming out there, but the written discovery that the  
13 defendants sent to us that we then responded to and we tell  
14 them here's what we're doing, how we're doing it and we begin  
15 to do it. That defines our world.

16 The touch stop for this in our judgment has got to be  
17 the written discovery request under Rule 34 that was sent to  
18 us back in May or June, that we responded and lodged timely  
19 objection to and executed a protocol thereafter.

20 THE COURT: It sounds like what you are hanging your  
21 hat on, in terms of what you told me, is in the nature of an  
22 estoppel argument.

23 MR. BLECHMAN: It's more than estoppel. That  
24 certainly is an ingredient in it, yes.

25 THE COURT: Because you have gone this far down a

1 path and they had an opportunity to object before, you can't  
2 be asked to change, as opposed to starting today, I don't  
3 think we'd be saying we wouldn't have to do it now.

4 MR. BLECHMAN: Provided the defendants asked us for  
5 Metadata. To put an afterthought, we've spent time and a lot  
6 of people worked real hard to the point we got a million plus  
7 documents that are being processed and ready to go out and we  
8 produced about 320,000 documents.

9 What we're focusing on here is the process and I  
10 understand that, but at some point it seems to us, as the  
11 Court recognized in the Militar case from the Southern  
12 District of New York, there got to be a recognition.

13 I think that counsel for a party can excise his or  
14 her judgement to determine what is the protocol that is used  
15 for the client's searches.

16 What is happening here, we submit respectfully, is  
17 that the larger issue really is whether adversary counsel can  
18 dictate the protocol that is used by the other parties.

19 THE COURT: Framed that way, the answer is clearly,  
20 no. Just as clear to me, counsel for the producing party  
21 can't willfully adopt a protocol and say, we might miss  
22 something, but to bad, we're making a responsible choice.

23 If there is something that is lacking in the  
24 protocol, I think, that is fair game. I'm not saying that is  
25 what you've done, in terms of the two standards compared to

1 each other.

2 MR. BLECHMAN: I have no interest in arguing with the  
3 Court. The Court should have a clear idea the information that  
4 we're producing to the defendants gives them the kind of  
5 information that they really need here. This is not the parol  
6 evidence rule and a file application for a file size is  
7 somehow going to be irrelevant here. That is why you have  
8 courts that characterize this kind of information as wasteful  
9 resources.

10 The information that we're giving them can be  
11 searched with 99 percent accuracy. We feel comfortable and  
12 confident in the reliability of the information we're giving  
13 them and I wouldn't want the Court to have a different  
14 impression of that.

15 THE COURT: I was overstating it to make a point  
16 rather than to make an accusation of it. It's certainly not  
17 my intention.

18 Unless there is something more you wanted to tell me  
19 on this issue, I have one other question for you.

20 What's the difference -- what's driving the  
21 difference between your approach and the class plaintiffs, who  
22 seem willing to sign onto the stipulation?

23 MR. BLECHMAN: I suspect the answer-- and I hesitate  
24 to speak for the class-- for them largely they're representing  
25 much smaller companies and for them getting information, the

1 Metadata is very beneficial for them. For us we have much  
2 larger companies that have issues that may not necessarily be  
3 the same as the class in terms of the intrusiveness of the  
4 kinds of requests and I want to make that point before the  
5 Court moves to the other side.

6 In addition, the procedures that we're using are  
7 tried and tested and work and we've used them in a number of  
8 cases. That is why from the start, when this issue raised  
9 itself, when we became aware of it in the end of September  
10 early October, we told the class and the class defendants this  
11 is not something that the individual plaintiffs will agree  
12 on.

13 THE COURT: Talk to me about intrusiveness.

14 MR. BLECHMAN: It's fair to say from the collective  
15 experience from all of the people in the courtroom, a given  
16 person's e-mails, prepared in a business setting, are likely  
17 to contain information that is, one, not intended at the time  
18 to be for consumption by other people, and

19 Second, unquestionably contain information, at least  
20 for our clients, that has no reasonable relation -- that is  
21 not -- not relevant to issues in this case.

22 In other words, just a subset of the information in  
23 there. We've been told by our clients, and I need to make  
24 this point to the Court, the clients have been quite adamant  
25 to us, this is viewed as an unreasonably intrusive invasion of



1 the privacy interests of the people who are working in the  
2 company --

3 THE COURT: Is it similarly intrusive for the  
4 defendants?

5 MR. BLECHMAN: It might be. This is what they want to  
6 do, my client and the other individual plaintiffs, and we  
7 haven't said to them we want you to give us your Metadata. If  
8 they wanted to give us their production in the format that  
9 we're giving it to them, that would be fine-- that would be  
10 fine. The request that comes in the plaintiffs' written  
11 discovery --

12 THE COURT: Let me interrupt. Is that fine with you,  
13 if they don't provide the Metadata?

14 MR. WILDFANG: It's not fine.

15 THE COURT: I take it you don't want me to have two  
16 flavors of discovery in the case. Is that practicable?

17 MR. BLECHMAN: I don't see why not. We're giving  
18 them the information. If they need help to figure out how to  
19 search it, we'll help them. We told them that. That is a  
20 good faith offer, it gets them the information that they want.

21 THE COURT: I guess, what I don't understand in terms  
22 of intrusiveness, they are willing to do it even if you are  
23 not requesting it.

24 What I don't understand, I spoke to someone that had  
25 my e-mails in a business setting in front of someone else, and

1 I don't get why are your clients' are viewing it as intrusive  
2 so much more adversely than your opponents do. What is it  
3 about the data that is the issue that is so sensitive?

4 MR. BLECHMAN: I'm going to speculate in answering  
5 the Court's question, because I can't -- I don't purport to  
6 speak for defense counsel on in.

7 It's my opinion, that for the networks and a number  
8 of the banks, this is not the first antitrust case that they  
9 have been in.

10 There is the American Express and Discovery case,  
11 which the Court is familiar with. We found out only after the  
12 fact that for Visa 116 custodians that they produced, 89 of  
13 them are custodians in the American Express case.

14 Why? The point is before this process began I  
15 believe the defendants realized they had to produce  
16 documents -- first of all the written request from plaintiffs  
17 in these kinds of cases cover everybody and their companies  
18 and cover almost every piece of paper in the company. They  
19 made a judgment they need some protocol to manage that.

20 Second, I believe, that they realized they were going  
21 to have to go through a process of searching and producing  
22 documents for the same people in two or more other cases, and  
23 again this is my opinion, your Honor, but I believe what they  
24 made a decision way back, in order for them to do this most  
25 efficiently for themselves-- and I represent to the Court this

1 is an efficient mechanism for them, the way to do it  
2 efficiently is for them to use the protocols that they are  
3 using.

4 It's not that way for us. There is a real symmetry  
5 in the nature of the businesses why we're able to tackle --  
6 while we're able to tackle the issue of getting materials from  
7 our clients', in an hands on approach, which is different from  
8 the way they are doing it.

9 THE COURT: You are getting far afield from the  
10 question. Why your clients would be more sensitive to the  
11 intrusiveness of it than individuals on the other side,  
12 whether there is multiple litigation or not? At some point  
13 they're saying, we're exposed to this as well.

14 MR. BLECHMAN: In candor, I don't know that I could  
15 say somebody at Walgreen's is more sensitive about it than  
16 somebody at Visa. I don't know.

17 Just as a general proposition, I think most people  
18 probably are sensitive about the invasion of their e-mails.  
19 But I do know that that invasion is a price that the  
20 defendants were willing to pay in order to be able to use a  
21 search protocol that for them was most efficient in managing a  
22 number of antitrust cases in which they were being called upon  
23 to produce a great many documents for a number of people who  
24 were going to be witnesses in two or more of those cases. It's  
25 not the same for us.

1 THE COURT: I take it we wouldn't have this issue and  
2 your clients would not have to worry about potential  
3 intrusiveness, and you were members of the class, and decided  
4 to pursue a separate action, right?

5 MR. BLECHMAN: If our clients were members of the  
6 glass they would not be called upon to produce documents at  
7 this point, correct.

8 THE COURT: Anything else that I need to know about  
9 this issue from your prospective?

10 MR. BLECHMAN: Not right now.

11 THE COURT: Who is going to speak for the defendants?

12 MR. VIZAS: I will be brief.

13 First, let's go back to where this begins. The  
14 plaintiffs, not the class plaintiffs, the individual  
15 plaintiffs, and plaintiffs both requested Metadata from the  
16 defendants back in May at their initial document request.  
17 They didn't say it was intrusive or improper.

18 Mr. Blechman requested that information from us. We  
19 didn't volunteer it. We agreed to it because we believed it  
20 appropriate, not because our people are less disturbed about  
21 the e-mails.

22 When we filed our document request, back in May, the  
23 idea this was a surprise to Mr. Blechman that we wanted this,  
24 we asked for documents to be provided in the same form in  
25 which they are kept in the ordinary course of business and

1 that electronic data should be produced in an electronic  
2 form.

3 We then went on to define electronic data as all  
4 information of all kinds maintained by a electronic data  
5 processing systems. There was a request made by us in May and  
6 them in May. This didn't arise the end of November or  
7 December. It was not a complete to surprise that was an offer  
8 on their own protocol. There is no estoppel here.

9 The first week of September the plaintiffs again,  
10 not the class plaintiffs, but the individual plaintiffs and  
11 the plaintiffs presented us with a protocol completely  
12 appropriate, which has been negotiated now for several months,  
13 which included from the first week in September, the  
14 requirement that the parties produce their electronic  
15 documents in electronic form and that they produce the  
16 Metadata.

17 There was never any dispute, no one raised a concern,  
18 it was not a word at a meeting, not a word in an e-mail. This  
19 estoppel notion of surprise is just flatly wrong.

20 The first this arose was late in the day, end of  
21 November early December, when at a deposition in Texas one of  
22 our co-counsel asked Mr. Blechman a question, and he said, I  
23 might have some problems with that. I sit here and a little  
24 bit like through the looking glass that this was a shock. Was  
25 a new wrinkle is wrong and I'm shocked.

1 But leaving that aside the OCR process is not as good  
2 as getting the electronic data --

3 THE COURT: Tell me what you didn't get that you  
4 need?

5 MR. VIZAS: You don't get two things. There is a  
6 searchability problem, which others can tell you more about  
7 than I.

8 Basically, when you scan something you get a scan  
9 copy, you don't get an electronic copy. In a case with  
10 millions of documents, we produced three and a half million  
11 document already, that is a huge task to tell your searches to  
12 go back and look at the database. We use a different  
13 protocol --

14 THE COURT: I can certainly understand that problem  
15 being more of an issue if you got a variety of formats that  
16 are being scanned in OCR. Maybe I'm wrong about this. If  
17 what is happening they are printing out e-mails, which tend to  
18 be in the same font and doing it essentially in printed form,  
19 isn't the risk of OCR missing something or misinterpreting  
20 something minimal.

21 MR. VIZAS: I think it's a real problem. Our people  
22 tell us it's a real problem.

23 THE COURT: You had said there was something else.

24 MR. VIZAS: When you get the documents in electronic  
25 form by OCR you are taking away information that exists in a

1 document as to creation-- who created it, who revised it, when  
2 it was revised. There is a whole string of information that  
3 is transferred--

4 THE COURT: What of that is useful to you?

5 MR. VIZAS: All.

6 THE COURT: How? Give me some examples what you  
7 won't you been able to find out if you get it this way that  
8 you will get from what the class plaintiffs are producing?

9 MR. VIZAS: Why don't I let Ms. Rottenberg handle it.  
10 I can explain it, but she is more familiar with it.

11 MS. ROTTENBERG: To go back to your question, if we  
12 receive all of the documents from Mr. Blechman's clients, for  
13 example, we just get a CD of the documents, all OCRd, on that  
14 may be original paper which have been scanned, electronic  
15 documents perhaps, word documents that come from someone else,  
16 and there may be e-mails, many different kinds of documents.  
17 Then we take that and load it into our system. The way that we  
18 work, we then have to review those documents. There are  
19 millions of pages, very difficult to review them page by  
20 page. We maybe forced to do that when we try to avoid it to  
21 save on efficiency.

22 For example, people, if we need in a set of  
23 documents, everything is produced in tip images-- I think your  
24 Honor is familiar with that-- if we get tip images that we  
25 know from the Metadata was originally e-mails our search is

1 more reliable, we're searching electronic for electronic.

2 If we get images because they are all mixed in with  
3 paper scans, because they don't have the Metadata, then I know  
4 when I instruct the people that need to review the documents,  
5 searching is less reliable, and we may need in fact to go page  
6 by page.

7 If I get a CD of a million pages and everything has  
8 been scanned in OCRd, that forces me to go through those  
9 documents in a very different way, with much more effort, with  
10 lesser liability to the searching, and probably more time that  
11 needs to be spent on each document that would otherwise be  
12 done--

13 THE COURT: What about you don't get in terms of lost  
14 data?

15 MS. ROTTENBERG: Even at the simplest level one of the  
16 things that we don't get is the type of document it is. Once  
17 everything is scanned and OCRd you lose at its base level what  
18 was this document, was it an Excel spread sheet, an e-mail--

19 THE COURT: You can't tell by looking it?

20 MS. ROTTENBERG: You can, but you have to open every  
21 document. If I wanted to sort the documents and do e-mail  
22 first, I would not be able to do that.

23 THE COURT: I understand there are a hoist of  
24 efficiencies that are attained if you get it in the format you  
25 want.



1           What information you won't get?

2           MS. ROTTENBERG: The Metadata that we don't get in  
3 e-mails, what we've asked-- and we're not asking the plaintiff  
4 to do anything that we're not doing-- every piece of Metadata  
5 known to man, but what is readily available.

6           In some circumstances that would be many fields of  
7 Metadata and in other circumstances some less. It depends on  
8 the size of the system used. Metadata will reveal in the  
9 Metadata field the the CC, and sometimes the CCBs, who edited  
10 the document, what other custodians may have searched the  
11 documents that is not clear on the face of the document. It  
12 varies from the Metadata field on what system they used. If a  
13 document what production I might be able to tell from Metadata  
14 from the actual document three other custodians edited that  
15 document.

16           THE COURT: Let's pursue that. What does that lead  
17 to in determining information relevant to this case?

18           MS. ROTTENBERG: In a depositions, if a witness  
19 denied that they had seen that document or made changes to the  
20 document, I would be a position of saying, but according to  
21 your computer system you in fact made x-changes, could you  
22 explain that.

23           That actually could be very material, if we're  
24 talking about an agreement that was negotiated over an  
25 interchange or something -- their merchant discount rate were

1 the bank-- and we'll know who is involved from the Metadata if  
2 someone doesn't recall it.

3 THE COURT: To be hypertechnical. You are telling me  
4 how you might -- how this might lead to the discovery of  
5 impeachment information, which is not independently  
6 admissible.

7 How are you going to get admissible evidence,  
8 substantive admissible evidence? Maybe I am being  
9 hypertechnical.

10 MS. ROTTENBERG: I don't want to evade your question.  
11 It's very hard to say, standing here right now, there will be  
12 something in the Metadata that is itself admissible about the  
13 document --

14 THE COURT: Forgive me for interrupting. Not about  
15 the Metadata by itself. I can understand how Metadata may  
16 help you answer a question that may impeach a witness that  
17 says, I didn't see a document. What is that going to produce  
18 affirmatively?

19 MS. ROTTENBERG: Asking witnesses about information  
20 that would lead to affirmative evidence. What negotiations  
21 have you had and with whom. We might learn who was involved  
22 in the process and learn more about information that we  
23 wouldn't know to ask custodians about the information. You  
24 could not tell from just a paper document that they were  
25 involved in the process.

1           If we were concerned if someone was negotiating a  
2 particular deal to reduce their cost of payment, we won't be  
3 able to know who the parties were absent Metadata and someone  
4 if doesn't recall that we may not have access to the  
5 information.

6           THE COURT: Playing it out, and perhaps this is being  
7 overly hypothetical, I don't mean to put you on the spot. Try  
8 to give me an illustration of a situation, looking at the  
9 contents of an e-mail itself, which I assume, and you can  
10 interrupt me if I am wrong, I assume printed out in an OCR are  
11 going to show two CC lines, will it show BCC?

12           MR. BLECHMAN: Yes.

13           THE COURT: Let's assume for purposes of discussion  
14 that you have that information and data. You won't have  
15 revision dates and who else touched it as you say.

16           Give me a scenario as to what that is going to cost  
17 you.

18           MS. ROTTENBERG: The example is not on the e-mail.  
19 Contrary to what Mr. Blechman said earlier, and I think  
20 equally important as e-mail, Metadata is a electronic  
21 document, whether an Excel spread sheet, a draft of an  
22 agreement on someone's hard drive or on their system, those  
23 documents also have information about them, frankly, just as  
24 an OCR process would never capture, and these are something  
25 that you cannot see from the face of the document.

1 I concede on e-mails you are right, we'd see to,  
2 from, CC, assuming their system, and I don't know their  
3 system.

4 Some systems truncate e-mail addresses after a  
5 certain point. In our system, I can speak from experience, if  
6 you have X number of e-mails that you no longer see them when  
7 you print them out, Metadata would prevent that problem. I  
8 don't know if it's an issue for them.

9 THE COURT: From your prospective, your  
10 practicability to pursue what you need to do in terms of  
11 discovery, if we require the individual plaintiffs to provide  
12 the Metadata with respect to non-e-mail files, but not with  
13 e-mails, what does that do from you prospective?

14 MS. ROTTENBERG: We'll have fundamental problems.  
15 With e-mail , as Mr. Vizas pointed out, and maybe is slightly  
16 away from Metadata, taking an e-mail and transforming a tip  
17 and edge, without screening it with OCR we loose a search  
18 ability that we won't have and that plaintiffs are asking us  
19 to provide.

20 We're providing for them in all of our electronic  
21 documents, because we're translating them directly from  
22 electronic to images, in a way that is 100 percent searchable,  
23 including because we're giving Metadata that we are allowing  
24 them to segregate.

25 As they are using the example of Sheedy, our person

1 in charge of intervening groups that they invoke, they are  
2 able to do a search and pull up all of his e-mails, CCs, very,  
3 very easily. It will be a fast thing-- takes ten minutes and  
4 they have those documents to review. They are denying us the  
5 same ability.

6           Maybe we can search the OCR, and that is not always  
7 reliable. With Metadata we not only can make sure that Sheedy  
8 e-mailed it-- and we are prohibited from doing that-- that  
9 allows them with every document whether it was Sheedy's, one  
10 hundred percent reliability.

11           We're not going to have that same ability and it  
12 doesn't seem fair considering they are the plaintiffs, they  
13 have sued us, they asked us for Metadata, we asked them for  
14 electronic data.

15           They served us with a protocol that we have the same  
16 functionability that they have. We're not asking for anything  
17 that doesn't exist.

18           THE COURT: A couple of follow-up questions.

19           MR. BLECHMAN: If I can clarify a few points?

20           THE COURT: I do want to move on to some other  
21 topics.

22           MR. BLECHMAN: I do have one thing and it's  
23 important.

24           THE COURT: In terms of intrusiveness, the privacy  
25 concern here, you're going through all of e-mails yourself or

1 are you and your attorneys doing it?

2 MR. BLECHMAN: The clients provide us with the  
3 e-mails that are responsive to the defendants' discovery, in  
4 accordance with direction that we have provided the clients --

5 THE COURT: The basic idea, no matter what we do here  
6 on this issue, every persons' e-mail is being searched by some  
7 stranger, who is looking through their private e-mails.

8 MR. BLECHMAN: Not necessarily. We're educating the  
9 people who are being asked to search for materials as to what  
10 is needed. We have in house counsel that is working with us  
11 and with the clients in obtaining the information, but I don't  
12 know that I can represent to you that in every instance what  
13 you said --

14 THE COURT: Some individual employees in these  
15 companies are responsible for going through their in and out  
16 boxes and providing responsive e-mails?

17 MR. BLECHMAN: Yes.

18 THE COURT: What about deleted e-mails.

19 MR. BLECHMAN: To the extent they are in the system,  
20 your Honor, they are directed to retrieve them.

21 THE COURT: Just as a practical matter, are they  
22 getting them?

23 MR. BLECHMAN: If somebody else, if I had to go  
24 retrieve an e-mail, I would-- there are some functions that I  
25 would go to the computer to go to trash and find a deleted

1 e-mail.

2 THE COURT: If I were to do this in situations where  
3 I had to produce my e-mails, I wouldn't get everything.

4 MR. BLECHMAN: We feel we're getting what we're  
5 responsible for.

6 THE COURT: Just in terms of where there is a dispute  
7 on this, Ms. Rottenberg, was telling me because of what they  
8 provide you, you have some search capability that they don't  
9 have.

10 Do you disagree with that?

11 MR. BLECHMAN: I do.

12 THE COURT: Tell me.

13 MR. BLECHMAN: If I heard what defense counsel said  
14 the information that they actually are looking for, the very  
15 sorts of information your Honor mentioned, that information is  
16 specifically provided in the materials that we're turning over  
17 to them. They want to see Excel spread sheets --

18 THE COURT: You are missing my question. Ms.  
19 Rottenberg was saying, the name was Sheedy, you want to get  
20 all of Sheedy's e-mails, to CC, BCC, you could get that very  
21 quickly.

22 MR. BLECHMAN: I don't know if we can or can't.

23 THE COURT: You have a electronic search function --

24 MR. BLECHMAN: I take what Ms. Rottenberg said at  
25 face value. They can run an inquiry on the materials that we

1 send to them, in which they can do the same thing, if they  
2 don't know how we'll show them.

3 THE COURT: If I misread Sheedy's name, the OCR--

4 MR. BLECHMAN: Just as if it was misspelled when we  
5 put it into the system, we wouldn't get it --

6 THE COURT: Just to pursue this. If Sheedy's name is  
7 misspelled, neither side will get it from a electronic search  
8 that just looks for Sheedy?

9 MR. BLECHMAN: You wouldn't necessarily just do it  
10 that way.

11 THE COURT: It maybe fanciful, let's construct a  
12 scenario here where both sides want to find the name Sheedy,  
13 spelled just one way. There are some situations, because the  
14 originator of the document misspelled the name, neither side  
15 is going to get it if they look for Sheedy.

16 Are there some that you're going to find that they  
17 are not going to find because of the way OCR does it?

18 MR. BLECHMAN: I don't believe so. I say that based  
19 on having talked to the information technical people with whom  
20 we're working who have run tests on the accuracy and  
21 reliability of the information that we turned over asking just  
22 the kind of questions that you are posing to me now and they  
23 have assured me they will get that same information.

24 If I might, there were a view points that were  
25 raised, and I think it's important that the Court have a full



1 picture.

2 First, it's true that plaintiffs' consolidated  
3 written Rule 34 requests, the defendants seek Metadata, and  
4 the Court needs to understand that that reflects the class  
5 plaintiffs desire to get Metadata.

6 The fact that we don't want something and somebody  
7 else does, doesn't mean we can impose our will on the class  
8 plaintiffs to ask for it. That's why it's there--

9 THE COURT: Excuse me. Why don't you at least raise  
10 the issue in a more transparent way to the defendants, the  
11 class plaintiffs want it, but we don't want to start down this  
12 road.

13 MR. BLECHMAN: When the issue was raised -- we did  
14 when the issue became ripe-- the issue became ripe in  
15 September when we saw for the first time --

16 THE COURT: I understand.

17 MR. BLECHMAN: -- the proposed stipulation the  
18 defendants--

19 THE COURT: I understand the point.

20 Go ahead.

21 MR. BLECHMAN: On October 9th we informed the class  
22 that we'd not agreeing to provide Metadata. On October 11th  
23 the class told the defendants.

24 One other point, if I might. I know I'm taking up  
25 lots of the Court's time.

1 I don't know if the defendants have actually run  
2 searches, if they can gets the information they are looking  
3 for from the information given to them. There has been  
4 discussion, it's hard to say, they don't know our system, and  
5 maybe they can read the OCR, but what I suggest to this Court,  
6 what would make sense here, because what is at issue what is  
7 going forward, to allow us to work with the defendants to  
8 allow them to determine and confirm what we know to be the  
9 case, which is they can get the information that they say they  
10 need using our system, because it sound to me what we're  
11 talking about here, a little about how many angels can dance  
12 on the head of an pin.

13 I'm representing what I'm told is accurate and I'm  
14 not sure that the defendants actually know, as opposed to  
15 speculating, as to the concerns of the information they are  
16 getting from us--

17 THE COURT: What determines how would they know how  
18 accurate it was?

19 MR. BLECHMAN: Take Mr. Sheedy -- that is a bad  
20 example. It's information coming from us. Take some names,  
21 run inquiries on the information on them on file, that we've  
22 turned over, we're telling them the people whose files are  
23 going to be produced, and

24 The answer to the second part of the Court's  
25 question, I don't know the technical answer, but apparently

1 you can run individual inquiries, because I have gotten  
2 reports that were run, you put in the words and tells you--  
3 gives you percentage of the number of hits that you get and it  
4 tells you how accurate it is.

5 I apologize, I can't be more clear about what this  
6 mechanism is because in candor I don't fully understand it to  
7 be able to explain it you to you. The information technology  
8 people say those kinds of tests can be run.

9 THE COURT: In terms of burden, your concerned about  
10 intrusiveness, but the burden of shifting course, do you have  
11 a dollar figure of what it would cost you to do what the  
12 defendants asked?

13 MR. BLECHMAN: Going forward?

14 THE COURT: Yes.

15 MR. BLECHMAN: A million dollars, I don't know.

16 THE COURT: Do you have a sense, Ms. Rottenberg, in  
17 terms of efficiency you achieve between the two types of  
18 production, any kind of ball mark estimation of a dollar  
19 figure?

20 MS. ROTTENBERG: I don't have that estimation. I  
21 would not like to just -- we've not run the numbers as to how  
22 many we'd need.

23 If I could just respond to one point, to run tests  
24 and to run searches. Before I came into court today I did  
25 actually look at what the plaintiffs produced and I wanted to

1 come to court prepared in case you had questions about  
2 production.

3 Here is the number of documents we produced and  
4 here's how many were electronic documents, how much paper, how  
5 much were e-mail, because we have not received that  
6 information from plaintiff, I could not run the search.

7 There was no way for me to go through the 100,000  
8 documents and say how many were electronic versus how many  
9 were on paper. That's a huge detriment to us. I can't quantify  
10 it standing here today.

11 If I had to quantify it, I would need to figure out  
12 the number of extra attorney hours and contract attorney hours  
13 that we'd need to search the production that would allow us--  
14 if we wanted to look at only e-mails-- to do that and the only  
15 way right now because of the way they produced it is to  
16 basically look at it page by page, because OCR will not reveal  
17 e-mail as opposed to other types of documents.

18 THE COURT: I will not give you a ruling from the  
19 bench today.

20 What I would like, to the extent there is  
21 disagreement, to what I'm overly simplistically calling the  
22 estoppel part of the argument, put in a short letter the  
23 documents that I need to look at your understand your  
24 position.

25 I don't want argument. I want to know that I'm

1 looking at the right documents on each side.

2 Can you get me that within a week?

3 MS. ROTTENBERG: Yes.

4 MR. BLECHMAN: Yes.

5 MS. ROTTENBERG: A week from today is Christmas,  
6 could it be Tuesday?

7 THE COURT: Of course. Make it the end of next  
8 week.

9 MR. BLECHMAN: A week from Friday?

10 MS. ROTTENBERG: That is fine.

11 THE COURT: Let's move on.

12 There is an issue about substantial completion date  
13 for defendants' responses to plaintiffs' requests. I had one  
14 question. I'm happy to hear from both sides. It is more a  
15 matter of you folks all working and wanting to get done as  
16 soon as possible, I'm sure. Who is speaking for the bank  
17 defendants?

18 Here's my question, and I shouldn't group them  
19 because there are several different bank defendants.

20 I'm looking at page 13 of the status report. Capital  
21 One expects to produce its first wave of document in late  
22 December, early January. Bank of America is engaged in  
23 collecting the documents for production. JP Morgan Chase has  
24 searched and gathered the documents maintained by the bank.  
25 Those three jumped out at me.

1           As I understood from our discussion last time, the  
2 bank defendants had committed to start production by early  
3 November. Is that incorrect?

4           MR. GREENE: I represent JP Morgan Chase. Peter  
5 Greene. I think when we were here last time and we committed  
6 to start production as soon as we could, we thought we'd be  
7 able to do that in November.

8           I know with respect to Chase, since we were here, we  
9 made three productions, the most recent last Friday, and we  
10 made one before the last pre-hearing and one between today and  
11 last Friday.

12           I can't speak for the other bank defendants. We're  
13 giving rolling production and processing the documents and  
14 getting them out the door as quickly as we can as the report  
15 indicates.

16           THE COURT: I am sure I do underestimate how  
17 burdensome it is to get the stuff reviewed. I want to make  
18 sure that we're staying close to prediction.

19           Anything else counsel for Capital One or Bank of  
20 America can tell me?

21           MR. LADNER: Mark Ladner for Bank of America. We  
22 produced documents since our last conference. We have been  
23 working diligently to review documents and certainly the date  
24 of November 15th looms large in our mind and have committed an  
25 awful lot of resources to get it done by that date.

1           THE COURT: Anybody who thinks, speak now please, if  
2 it's the case, anybody who thinks that we're not on track to  
3 complete it on schedule?

4           MR. VIZES: Your Honor, I guess, I will speak since  
5 we're the producer of documents in the range of three and half  
6 million. Could I promise you today by the end of February? Is  
7 there anything that I know that we're not going to make it?

8           THE COURT: That's what I'm looking for.

9           MR. VIZES: I think we're in the same position.  
10 There are lots and lots of people doing this. Absent any  
11 glitches we're hopeful.

12           MR. GREENE: Your Honor, we agree with what Mr. Vizes  
13 said, we are hopeful we'll make the February 15. We're  
14 certainly trying. We have committed an awful lot of resources  
15 to doing that.

16           The way production is going, we produced a lot of  
17 documents. I could not promise we'll make the 15th. We're  
18 certainly trying and I have no reason to believe at this point  
19 that we'll not. I'll be in a lot better position as we get  
20 into the first and second week in January as to whether any  
21 glitches or difficulties pop up.

22           It would be our intention to let the Court and  
23 opposing counsel know immediately if there is a problem.

24           THE COURT: Okay. Anyone on behalf of the plaintiffs  
25 who want to address this issue. I just wanted a status

1 update.

2 MR. WILDFANG: We take defense counsel at their word.  
3 I would note one of the advantages of having Metadata, we can  
4 search by custodian. We've done some of that and it appears  
5 that for some of the defendants, I will pick on Visa USA, no  
6 documents from Mr. Sheedy's files have been produced.

7 For Chase out of 6,000 documents produced, we have  
8 eight from the guy who is the representative on the Visa  
9 board. I'm not accusing them of any of this, it appears a  
10 lot of this stuff that we're waiting for, we're still waiting  
11 for.

12 THE COURT: We will address issues as they arise. I  
13 wanted to get further input on that.

14 On the custodian list there was one person in dispute  
15 and that has been resolved.

16 You folks were going to update me on the status of  
17 discovery with respect to the defendants reorganization.

18 MR. VIZAS: At your directions, after the last  
19 conference, a small group of people on behalf of plaintiffs  
20 and the defense side have met several sometimes and exchanged  
21 information. I think we narrowed it down to a couple of  
22 issues.

23 MR. WILDFANG: We made progress. There are a couple  
24 of sticking points that hopefully when we can get over.

25 THE COURT: The same thing with data discovery.



1 MS. ROTTENBERG: Yes, your Honor. We are in similar  
2 position.

3 THE COURT: The next thing I have on my agenda is  
4 this opt out from the earlier MDL case. I'm not sure that I  
5 understand whether there is something currently before me.

6 MR. VIZAS: No. We thought we'd include it. It's  
7 the one opt out case.

8 MR. WILDFANG: The only issue, we have served  
9 discovery, it has been resisted, that prompted some additional  
10 discussion of trying to settle the matter, if it doesn't  
11 settle, Visa's position it should be coordinated with this  
12 discovery.

13 THE COURT: We'll get there when we get there.  
14 Westpac, the Australian bank, have you folks narrowed your  
15 dispute on that?

16 Do we have counsel for Westpac?

17 MR. JACOBSON: Mr. Wildfank can address that.

18 MR. WILDFANK: There is nothing to be decided today.  
19 We have made progress. I'm sure at the end of the day there  
20 won't be something that comes back.

21 THE COURT: Still working on it?

22 MR. WILDFANG: Yes.

23 THE COURT: Make sure you give the court reporter  
24 your information.

25 Plaintiffs' responses to the defendants' request.

1 Let's go through that.

2 First of all, there is issue about the custodial  
3 search approach. As I understand it, Mr. Blechman, this is  
4 your issue.

5 MR. BLECHMAN: Yes, your Honor.

6 THE COURT: There is sort of basic level, which I  
7 don't understand the dispute here. What's the difference  
8 between a custodial approach and what you are doing?

9 MR. BLECHMAN: The custodial approach here, here are  
10 the names of 134 people, we want you to search all of their  
11 files.

12 The approach that we have been using says where the  
13 documents are reasonably likely to exists that are responsive  
14 and not cumulative, not duplicative, that are in the hands of  
15 decision makers and people who are dealing directly with the  
16 banks or the networks and where are documents that are  
17 responsive to defendants' request that are located in common  
18 areas such as a file drawer where all the contracts might be  
19 kept that no individual might have.

20 Therefore, the difference is what we're doing is  
21 going and finding the materials that are responsive from the  
22 people who we, based on talking to the client, are expected to  
23 have this material that is responsive to their discovery.

24 What they're doing is far more of a dragnet approach,  
25 that in the end is calling for the production of materials

1 that are duplicative of what other people higher-up in the  
2 food chain have that are cumulative and Rule 26 says that we  
3 are allowed to protect ourselves from doing that kind of  
4 search.

5 THE COURT: The difference it seem to me you are  
6 starting with a smaller list of people.

7 MR. BLECHMAN: It's a small peer group of people.

8 THE COURT: That is an interesting move. This isn't  
9 a pointed question. You are starting with a list of people  
10 and going from there to identify what is responsive.

11 MR. BLECHMAN: We're starting by going to people that  
12 we think are decision makers who have knowledge and from there  
13 we go and find the other people where we think the document  
14 might lie.

15 The approach that we're doing allows us to get the  
16 information without producing lots of cumulative information.  
17 We're talking to them, to defendants.

18 THE COURT: You are saying it's not ripe yet.

19 MR. BLECHMAN: I think it's not ripe.

20 THE COURT: Mr. Vizas.

21 MR. CARNEY: Gary Carney.

22 There are two issues, I think, with respect to  
23 plaintiffs' responses. One, the custodian list issue I will go  
24 along with Mr. Blechman. It's probably not ripe in the sense  
25 that we are talking with them about what the scope of that

1 should look like.

2 We're concerned it has taken this long. We wanted to  
3 pursue it in a logical manner so we serve our request, took  
4 30(b)(6) depositions, got a sense of their organization, we've  
5 gone back to them in every case, with respect to Mr.  
6 Blechman's clients, and have asked for custodians that we  
7 think, based on the 30(b)(6) depositions are relevant and  
8 important.

9 In the December 4th conference plaintiff told us that  
10 they will come back to us in the next couple of weeks, which  
11 is today, and we've gotten some responses.

12 If Mr. Blechman's informs us many responses are in  
13 the back and we're expecting updated custodians and we would  
14 be happy to talk to them and hear the condition on that.

15 The second issue though is one that sort of dovetails  
16 what we were talking about before, the approach that the  
17 individual plaintiffs are taking with respect to electronic  
18 discovery.

19 As Mr. Blechman said there is fairly well settled law  
20 out there what you should do in terms of going about searching  
21 hard copy documents. We don't know what they're doing with  
22 respect to electronic documents.

23 It appears from what Mr. Blechman told us they are  
24 essentially doing it the same way, they are asking their  
25 people to what pull down the e-mails-- to search pursuant to

1 instructions, but it seems clear to us there is no systematic  
2 effort the defendants identify to pull all e-mails in the in  
3 box, out box, what is on the electronic --

4 THE COURT: To some extent we're doing this in a  
5 vacuum. Do you have search protocols? Are you willing to  
6 give it to them?

7 MR. BLECHMAN: We're willing to supply them with what  
8 we're doing.

9 THE COURT: The instructions that you are sending  
10 out?

11 MR. BLECHMAN: Allow me to confer with other lawyers  
12 from other firms who represent other individuals, and subject  
13 to doing so -- subject to their agreement--

14 THE COURT: I'm with you, that the responsibility to  
15 discharge is yours and you have to figure out how to do it.  
16 They get to argue if it's not producing what they are entitled  
17 to and I think there are two ways that we can discuss it. We  
18 agree in advance how you are going to do the search or we find  
19 out after you made the production how you went about doing  
20 it.

21 I wouldn't say this in a smaller case, where we've so  
22 many moving parts, the only way to resolve these kinds of  
23 disputes if they see -- if you are not willing to commit to  
24 specific search protocols by agreement, at least tell them  
25 what it is you have done.

1 I understand you have to make a decision whether you  
2 are going to do it. You will have to educate me passed that  
3 if you don't go along with that.

4 MR. CARNEY: Thank you.

5 THE COURT: I think is essentially the issues that  
6 are in the status report that we needed to cover today. Is  
7 there anything else?

8 MR. WILDFANG: Talking to some of my colleagues, it  
9 might be helpful to the Court to look beyond March for some  
10 status conference dates.

11 THE COURT: Why don't I do it as last time, schedule  
12 some down the road past March. In the order that comes out  
13 today, to the extent dates there are problems, you confer and  
14 get back to me.

15 MR. VIZES: Could we do a day other Monday?

16 THE COURT: Because of Sunday travel. Is Friday  
17 problematic?

18 I'm happy to change the remaining conferences through  
19 March. Are those Mondays?. I will reschedule, if there are  
20 any problems, I can change them. The one think that I don't  
21 want to move, we have you coming in on January 29th. If we  
22 move that off the top of my head to the 31st, which is a  
23 Wednesday--

24 MR. VIZES: That would be great.

25 MR. WILDFANG: We have a prior engagement on the

1 31st.

2 MR. VIZAS: We can move that.

3 MR. WILDFANG: I don't know if we can.

4 THE COURT: I'm happy to move it. I want you folks  
5 to talk among yourselves. In the next couple of days get back  
6 to me with an alternative date. I will leave that open. I  
7 didn't want to just give you a date. Anything else, folks?  
8 Then I will see you January 29th or sometime shortly  
9 thereafter. Have a good day.

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